

NO. PD-0941-17

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
9/18/2018
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CHRISTIAN VERNON SIMS, Appellant

V.

THE STATE OF TEXAS

ON DISCRETIONARY REVIEW OF CAUSE NO. 06-16-00198-CR;
SIXTH JUDICIAL DISTRICT COURT OF APPEALS AT TEXARKANA;
CAUSE NO. 26338; SIXTH DISTRICT COURT OF LAMAR COUNTY

STATE'S SUPPLEMENTAL BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.2(a)(1)(A), the list of parties and counsel is not required to supplement or correct the appellant's list.

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STATEMENT OF THE CASE

This is a murder case involving the victim, Annie Sims, and two suspects: Christian Vernon Sims (Sims) and his girlfriend, Ashley Morrison (Morrison). *See* Tex. Penal Code Ann. § 19.02(b) (West Supp. 2017).

After the denial of his various motions to suppress evidence, Sims reached a plea agreement with the State of Texas (the State), in which, he entered a plea of guilty and received a sentence of thirty-five (35) years confinement in the Institutional Division of the Texas Department of Criminal Justice (TDCJ-ID). *See* RR, Vol. 4, pgs. 4, 17. Sims reserved the right to appeal the denial of his motions to suppress (RR, Vol. 4, pgs. 4, 17), and he timely perfected his appeal by filing a notice of appeal (CR, pgs. 414-415) from the trial court's final judgment of conviction. *See* CR, pgs. 421-422.

On direct appeal, the court of appeals affirmed the trial court's final judgment. *See Sims v. State*, 526 S.W.3d 638, 641 (Tex. App.--Texarkana 2017, pet. granted). Sims timely filed his petition for discretionary review, and this Court granted the appellant's petition for review as to grounds one (1) and two (2).

Post-submission, both parties moved this Court for leave to file supplemental briefs, which this Court granted.

SUPPLEMENTAL GROUND(S) IN REPLY

SUPPLEMENTAL REPLY TO GROUND NO. 2-S: THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT’S FINAL JUDGMENT OF CONVICTION BECAUSE, ALTHOUGH SIMS COULD MEET THE TEST OF REASONABLE EXPECTATION OF PRIVACY UNDER CARPENTER v. UNITED STATES (2018), “THE EXIGENCIES OF THE SITUATION” JUSTIFIED THE WARRANTLESS COLLECTION OF CELL-SITE LOCATION INFORMATION (CSLI) BY LAW ENFORCEMENT IN DECEMBER OF 2014.

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**STATE’S SUPPLEMENTAL
BRIEF ON THE MERITS**

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, the State of Texas (the State), by and through Gary D. Young, the elected County and District Attorney of Lamar County, and Jeffrey W. Shell, *Attorney Pro Tem*, respectfully submits its Supplemental State’s Brief on the Merits under a previous ruling by this Court.

References to the Reporter’s Record and the Clerk’s Record are referred to as “RR” and “CR,” respectively, with the corresponding volume(s) and page number(s).

SUPPLEMENTAL STATEMENT OF FACTS

The parties filed their respective briefs on April 3rd and May 3, 2018. With the respective briefs filed, this Court set the above-styled and numbered cause for submission on or about June 27, 2018.

On or about June 22, 2018, the United States Supreme Court issued an opinion in *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2206, ___ L.Ed.2d ___ (2018). As a result, the parties filed motions for leave to file supplemental briefs, which this Court granted.

On or about June 28th, Sims filed his supplemental brief. The State will be filing its supplemental brief on or about September 18, 2018.

SUMMARY OF THE ARGUMENT

On June 22, 2018, the United States Supreme Court decided *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2206, ___ L.Ed.2d ___ (2018) and, under that decision, Sims would have maintained a legitimate expectation of privacy in the record of his physical movements, as captured by cell-site location information (CSLI) and Verizon in December of 2014. So, Sims could have arguably met the reasonable-expectation-of-privacy test under the *Carpenter* decision.

But, his second ground of review should still be overruled because an exception applied. “The exigencies of the situation” made the needs of law enforcement in Lamar County so compelling that a warrantless search of CSLI was objectively reasonable under the Fourth Amendment. This Court should hold accordingly or, in the alternative, remand the above-styled and numbered cause to the court of appeals to address the State’s argument as to “the exigencies of the situation.”

ARGUMENT AND AUTHORITIES

SUPPLEMENTAL REPLY TO GROUND NO. 2-S: THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT’S FINAL JUDGMENT OF CONVICTION BECAUSE, ALTHOUGH SIMS COULD MEET THE TEST OF REASONABLE EXPECTATION OF PRIVACY UNDER *CARPENTER v. UNITED STATES* (2018), “THE EXIGENCIES OF THE SITUATION” JUSTIFIED THE WARRANTLESS COLLECTION OF CELL-SITE LOCATION INFORMATION (CSLI) BY LAW ENFORCEMENT IN DECEMBER OF 2014.

A. Introduction: The Issue Was Left Unanswered in *Ford*.

In *Ford v. State*, 477 S.W.3d 321 (Tex. Crim. App. 2015), this Court stated that “[c]ourts are split on the right-to-privacy question because it is a close call (at what point does historical cell-site-location data become content?).[.]” *See id* at 334-35 (reference to footnote omitted). In *Ford*, this Court explained that “it is widely predicated that the Supreme Court is primed to take up the issue of whether the warrantless seizure and search of historical cell-phone records revealing the location and movements of a cell-phone user over at least an extended period of time is permitted by the Fourth Amendment.” *See id.* at 335.

As predicted, the United States Supreme Court resolved that issue in *Carpenter v. United States*, 585 U.S. ___, 138 S.Ct. 2206, ___ L.Ed.2d ___ (2018). However, the *Carpenter* Court did not specifically resolve the issue as to “exigencies” in the present case, but it did provide guidance to follow.

B. **Carpenter: The Reasonable-Expectation-of-Privacy Test.**

In *Carpenter*, the United States Supreme Court addressed the question of whether the Government conducts a search under the Fourth Amendment when it accessed historical cell phone records that provided a comprehensive chronicle of the user's past movements. *See Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2211. In *Carpenter*, the Supreme Court reasoned that this sort of "digital data--personal location information maintained by a third party--did not fit neatly under existing precedents. *See id*, 585 U.S. at ____; 138 S.Ct. at 2214. Instead, the Supreme Court reasoned that requests for cell-site records lie at the intersection of two lines of cases:

(1) The first set of cases addresses a person's expectation of privacy in his physical location and movements. *See id*, 585 U.S. at ____; 138 S.Ct. at 2215 (citing *United States v. Knotts*, 460 U.S. 276 (1983); *United States v. Jones*, 565 U.S. 400 (2012)).

(2) In a second set of decisions, the Supreme Court mentioned a line between what a person keeps to himself and what he shares with others. *See Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2216 (citing *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979); *United States v. Miller*, 425 U.S. 435, 443 (1976)).

1. **An Individual Maintains a Legitimate Expectation of Privacy in the Record of His Physical Movements, as Captured Through Cell-Site Location Information (CSLI); The Information Obtained Was the Product of a Search.**

In *Carpenter*, however, the Court declined to extend *Smith* and *Miller* to cover these novel circumstances by the following:

Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[]

See Carpenter, 585 U.S. at ____; 138 S.Ct. at 2217 (footnote omitted).

In *Carpenter*, the Court further explained its declination by the following:

We therefore decline to extend *Smith* and *Miller* to the collection of CSLI. Given the unique nature of cell phone location information, the fact that the Government obtained the information from a third party does not overcome Carpenter's claim to Fourth Amendment protection. The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools,

such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. . . .

Having found that the acquisition of Carpenter’s CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. . . .

We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party.

See Carpenter, 585 U.S. at ____; 138 S.Ct. at 2220-22.

2. **Case-Specific Exceptions: The Exigencies of the Situation.**

Further, even though the Government will generally need a warrant to access CSLI, the Court held in *Carpenter* that case-specific exceptions may support a warrantless search of an individual’s cell-site records under certain circumstances. *See Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2222. “One well-recognized exception applies when ‘the exigencies of the situation’ made the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.” *See id* (citing *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978))). “Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.” *See Carpenter*, 585 U.S.

at ____; 138 S.Ct. at 2223 (citing *King*, 563 U.S., at 460, and n. 3.). As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. See *Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2223.

C. **Application of the *Carpenter* Rationale to the Present Case.**

In applying the *Carpenter* rationale to the present case, Sims would have maintained a legitimate expectation of privacy in the record of his physical movements, as captured by CSLI and Verizon in December of 2014. See *Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2217. But here, as the *Carpenter* Court specifically recognized, “the exigencies of the situation” made the needs of law enforcement in Lamar County so compelling that a warrantless search of CSLI was objectively reasonable under the Fourth Amendment. See *Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2222 (citing *King*, 563 U.S., at 460, and n. 3.).

As applied here, the *Carpenter* Court specifically mentioned that such exigencies included the need to pursue a fleeing suspect. See *Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2223. That was the precise situation here--when officers had Sims’ mobile carrier “ping” or track Sims’ cellular telephone by using information from cell towers along a highway in Oklahoma, Sims’ northerly path of travel. See *Sims*, 526 S.W.3d at 640-41.

As a result, because law enforcement was confronted with an urgent situation, such a fact-specific situation should justify the warrantless collection of CSLI. *See Carpenter*, 585 U.S. at ____; 138 S.Ct. at 2223. Similarly here, this Court should hold that the warrantless collection of CSLI was justified under *Carpenter* and the appellate record in the present case. *See id.*

In the alternative, the State sufficiently briefed “the exigencies of the situation” in the court of appeals below. However, the court of appeals did not address the State’s argument in affirming the trial court’s denial of Sims’ motion to suppress. In the alternative, the State prays for a “limited” remand of the above-styled and numbered cause to the court of appeals to address the State’s argument, as it relates to “the exigencies of the situation.”

In conclusion, the appellant’s second ground should be overruled due to the specific “exigencies of the situation,” *i.e.*, a fleeing suspect, like Sims. In the alternative, the above-styled and numbered cause should be remanded for the “limited” purpose of addressing “the exigencies of the situation.”

PRAYER

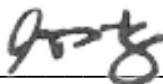
WHEREFORE PREMISES CONSIDERED, the State of Texas prays that upon final argument and submission, this Court affirm the Court of Appeals' judgment in all respects and adjudge taxable court costs against the appellant; or in the alternative, remand the above-styled and numbered cause for the "limited" purpose of addressing the exigencies-argument. Finally, the State prays for such other and further relief, both at law and in equity, to which it may be justly and legally entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, the State's Brief on the Merits was a computer-generated document and contained 3230 words--not including the Appendix, if any. The undersigned attorney certified that he relied on the word count of the computer program, which was used to prepare this document.



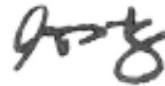
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CERTIFICATE OF SERVICE

This is to certify that in accordance with Tex. R. App. P. 9.5, a true copy of the “State’s Supplemental Brief on the Merits” has been served on the 18th day of September, 2018 upon the following:

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